

October 24, 2012

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

**Re: In the Matter of Wavecom Solutions Corporation, Transferor and Hawaiian
Telcom, Inc., Transferee; Application for Consent to Transfer Control of
Domestic Authorizations Under Section 214 of the Communications Act, as
Amended, WC Docket No. 12-206**

Dear Ms. Dortch:

Wavecom Solutions Corporation (“Wavecom”) and Hawaiian Telcom, Inc. (“HTI”) jointly, “the Applicants”) hereby file this brief response to the *ex parte* letter filed by L’Office des postes et télécommunications de Polynésie française (“OPT”) on October 9, 2012 in the above-captioned proceeding (“Letter”).

OPT’s unauthorized reply fails to address the most critical legal point raised by Wavecom and HTI in this proceeding: FCC precedent is clear that alleged harms unrelated to the transaction are not relevant to merger review.¹ The specific concern raised by OPT involves a Landing Party Agreement with Wavecom that predates the proposed transaction. OPT is currently utilizing the provisions of this Agreement to escalate its dispute with Wavecom, and has threatened to arbitrate if that negotiation process is unsuccessful.² As the Commission repeatedly has found, these negotiation and arbitration processes are the appropriate mechanisms for addressing contractual disputes, not a license transfer proceeding.³

While OPT’s attempts to cloak its contractual dispute as market competition concerns should be disregarded on this basis alone, its arguments also must fail for lack of merit. OPT articulates general antitrust principles and parses snippets from easily distinguishable Commission decisions, but provides no facts, statistics, or analysis to

¹ Joint Reply Comments of Applicants, WC Docket No. 12-206, 13 (filed Sept. 19, 2012) (“Reply”).

² See Reply, Attachment 1, Declaration of Jeremy Amen, Exhibit 1 (“Amen Declaration”). Although OPT’s counsel insists that OPT has complained “for years” about Wavecom’s alleged conduct, Letter at 13, the facts are otherwise. See Amen Declaration ¶ 3 (noting that, prior to August 2012, OPT had not “raised any concerns with Wavecom about the manner in which Wavecom has performed its contractual obligations or otherwise provided services to OPT.”).

³ See, e.g., *Adelphia Communications Corporation-Comcast Corp. & Time Warner Cable Inc. Transfer*, Mem. Opin. & Order, 21 FCC Rcd 8203, ¶ 240 (2006).

demonstrate that the instant transaction would adversely impact competition in any relevant market. As the Applicants indicated in their Reply, the FCC repeatedly has found that the relevant market for analyzing transactions involving submarine cables is international transport within the relevant global region.⁴ Plainly, adequate competitive alternatives are available in the international transport market in the trans-Pacific region. Indeed, OPT makes clear that Hawaii is simply an intermediate transiting point for OPT to transport international traffic to the continental United States and beyond, and it acknowledges that it has other alternatives to transport traffic to Los Angeles.⁵ Transport of one leg of an end-to-end international transport service—the only service that OPT is providing⁶—is only part of the end-to-end international transport market and should not be analyzed separately.

OPT argues that, because Hawaii is comprised of islands separated from the U.S. mainland, Commission precedent compels examining a narrower relevant market.⁷ This argument is without merit as Applicants' Reply notes.⁸ Furthermore, none of the cases upon which OPT relies in its most recent filing involved the combination of submarine cable assets in a particular geographic area, and OPT misreads these cases in any event.

For example, in claiming that cable station access and landing services constitute a "relevant market," OPT cites the *AT&T Submarine Order*, which involved issuance of a cable landing license for AT&T's proposed submarine cable system extending between St. Thomas and St. Croix in the U.S. Virgin Islands.⁹ The specific issue in that case was whether AT&T should be required to operate the proposed system on a common carrier

⁴ Although OPT claims that the Applicants argue that the Commission analyze only a global market for international transport, Letter at 6, the Reply clearly analyzes the issues based on the trans-Pacific regional market in accordance with Commission precedent. Reply at 5.

⁵ Letter at 11. Currently, OPT interconnects its undersea cable system at Kawaihae to the Southern Cross undersea cable to Los Angeles for delivery of such traffic, which in itself belies its claims that there are no competitive alternatives available to complete its end-to-end international transport services.

⁶ *Id.* at 4. OPT disputes that Wavecom is an international transport provider. *Id.* at 6 n.13. Applicants do not disagree. As the Applications indicate, Wavecom's undersea cable facilities are located among islands in the State of Hawaii. *See, e.g.,* Wavecom Solutions Corporation, Transferor, and Hawaiian Telcom, Inc., Transferee, Application for Consent to Transfer of Control Domestic 214 Authorization, WC Docket No. 12-206, Exhibit 1, at 1-2 (filed July 18, 2012). However, Wavecom is licensed to provide global resale and facilities-based international services and in fact operates a cable landing station that is available to international transport providers.

⁷ Letter at 5.

⁸ Reply at 5 n.18.

⁹ Letter at 3.

basis.¹⁰ In answering this question in the negative, the Commission found that AT&T lacked “sufficient market power to warrant common carrier regulation” in the two relevant markets it identified: (i) facilities providing access to the St. Thomas station; and (ii) facilities operating between St. Thomas and St. Croix.¹¹ Given that the case involved the circumstances under which AT&T should be permitted to operate its submarine cable system, these markets were deemed relevant in order for the Commission to assess “the potential competitive effects ... of the proposed facility.”¹² No similar assessment is required here.¹³

Clearly, OPT has failed to demonstrate that the Kawaihae cable landing station is a “bottleneck” facility. There is nothing unique about the Kawaihae cable landing station on the island of Hawaii except that this is the location where OPT agreed with Wavecom to land its Honotua cable in order to provision international transport services transiting the Island of Hawaii. Cable landing stations in the Pacific are not out of capacity, and there is not a single entry point for cables in Hawaii. OPT could have landed its cable on Oahu if that is where it needed to connect its facilities. There are five international cable stations in Hawaii that OPT could have chosen, and many more if OPT had chosen other entry points to the United States elsewhere in the Pacific. OPT cannot use the fact that it elected to land the Honotua cable at Kawaihae to now bootstrap itself into an argument that Kawaihae constitutes a “monopoly” or “bottleneck.” Rather, an appropriate antitrust analysis must look at the entire array of competitive choices that were available at the outset, and the choices that would be available now to other customers that could prevent the combined entity from exerting market power or engaging in any anticompetitive behavior—issues that OPT does not address. Therefore, no separate market analysis is appropriate for Kawaihae or any cable landing station in Hawaii.¹⁴

¹⁰ *AT&T Submarine Systems, Inc.*, Cable Landing License, 11 FCC Rcd. 14885, ¶¶ 1-2 (Int’l Bur. 1996) (“*AT&T Submarine Order*”), *subsequent history omitted*.

¹¹ *Id.* ¶¶ 40–51.

¹² *Id.* ¶ 40.

¹³ Furthermore, the illogical consequence of OPT’s position is that every cable landing station would necessarily constitute a bottleneck facility because, according to OPT, “a cable owner would be unlikely to switch the landing even to another cable station” in the face of “a small but significant” price increase. Letter at 4. However, OPT’s position is belied by the *AT&T Submarine Order*, in which the FCC concluded that the St. Thomas cable station was not a bottleneck facility because other facilities were available to access that station, there were other landing stations in the Caribbean that had available capacity to provide services, and there were no services over which AT&T could exhibit market power in the U.S. Virgin Islands. *AT&T Submarine Order*, ¶¶ 42, 49.

¹⁴ We note that OPT has already purchased a transport facility for backhaul from Wavecom to connect its cable landing on Hawaii with Oahu. The only issue is about price, not access or interconnection, something which should be left to negotiation between the parties, and if necessary, private arbitration.

Nor is it appropriate to analyze “intrastate transport and backhaul” as a relevant market, as OPT argues.¹⁵ The cases cited by OPT in support of this argument involved specific, compelling evidence of lack of competition post-closing.¹⁶ OPT has presented no evidence to suggest that HTI post-closing would have market power even remotely analogous to the applicants in those cases. Moreover, even the cases cited by OPT for this proposition found that this narrower market definition did not justify a conclusion that the facilities involved in those transactions were a “bottleneck” or justified the type of conditions proposed by OPT.¹⁷ Additionally, neither of these cases claimed that one undersea cable route was the appropriate framework for analysis, but rather focused on competition in specific service markets, something which OPT has not done here.¹⁸

Indeed, OPT fails to provide any basis to conclude that the combined entity poses a meaningful risk to competition in any relevant market—specifically, that HTI-Wavecom will be able to profitably enforce a “significant and non-transitory increase” in its price for some product or service. In the trans-Pacific market for international transport, numerous other facilities and services exist that would prevent the exercise of market power.¹⁹ Even if the FCC were to focus on the narrow segment of undersea backhaul facilities between the islands of Hawaii and Oahu, the combined entity cannot exert market power. There are at least three alternative providers of such backhaul, none of which face current or future capacity constraints. Indeed, any one of these alternative providers has ample ability to defeat a hypothetical price increase by HTI for Oahu-Hawaii backhaul transport services post-transaction. Further, as the Applicants explained

¹⁵ Letter at 4-5.

¹⁶ See *IT&E Overseas, Inc., Transferor, and PTI Pacifica, Inc., Transferee*, Mem. Opin. & Order & Declaratory Ruling, 24 FCC Rcd. 5466, ¶ 27 (WCB, WTB, IB, 2009) (“*IT&E-PT Pacifica Order*”) (applicants would control over 90 percent of the CNMI originating domestic long distance 1+ market post-closing); *Application of Alascom, Inc. AT&T Corporation and Pacific Telecom, Inc. For Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corporation*, Order & Authorization, 11 FCC Rcd. 732, ¶¶ 49, 53 (1995) (“*Alascom/AT&T Order*”) (where AT&T, the dominant long distance provider on the mainland, was acquiring Alascom, the dominant provider of Alaska interstate long distance services).

¹⁷ *IT&E-PT Pacifica Order*, ¶ 31; *Alascom/AT&T Order*, ¶¶ 50-52.

¹⁸ In *IT&E*, the Commission rejected the argument that use of one undersea cable between the CNMI and Guam would be anticompetitive because the issue was not merger-specific, 1+ long distance services were competitive, there were competitive alternatives to the undersea cable, and others could provide their own facilities for backhaul. *IT&E-PT Pacifica Order*, ¶ 30 & n.117. The *Alascom* case did not address whether a future undersea cable was a separate competitive market, but rather focused on whether the Alaska-mainland route was a separate long distance market from a nationwide long distance market. *AT&T/Alascom Order*, ¶ 48.

¹⁹ Reply at 6.

in their Reply, even if there were current capacity constraints on undersea transport from Oahu-Hawaii (of which there is no record evidence or suggestion whatsoever), any of the three alternative undersea networks could economically multiply its current transport capacity many times over very quickly²⁰ to take on new demand for customers facing a hypothetical post-transaction price increase.²¹ The existence of additional capacity by these competitors, coupled with the ability and incentive to use that capacity to defeat an exercise of market power,²² preclude a conclusion that the combined entity has the motive to deny competitors access to the undersea cable systems.²³

Finally, OPT argues for the first time in its Letter that alleged misconduct by Wavecom is cognizable in the merger proceeding.²⁴ However, FCC precedent is clear that in a transfer proceeding the Commission considers only *adjudicated* violations of the law that reflect on the character of the applicant (generally the transferee) to hold a license or fulfill the merger's public interest obligations.²⁵ Here, there has been no adjudication of any misconduct by Wavecom, which is the transferor not the transferee in

²⁰ Reply at 7-8 & Attachment 2, Declaration of Daniel Masutomi, ¶ 10.

²¹ OPT's arguments, Letter at 8, that the Southern Cross and Paniolo cable systems may not currently be aggressively promoting these transport services— even if true—is irrelevant. Both of these companies have offered such undersea transport services when faced with demand in the past, *see* Reply at 7-8, they are both well positioned with existing facilities to offer these services, and they would have ample incentive to respond to the opportunity to serve new customer demand from customers in the event of a hypothetical post-transaction price increase on the Oahu-Hawaii segment. OPT's claim that "they might not" is simply not the standard used in analyzing potential competitive effects, regardless of the market definition.

²² OPT's claim that the FCC found that both HTI and Wavecom had market power for their Hawaii cable systems false. Letter at 4. The FCC has never made such a finding, and nothing in the cases OPT cites suggests that these systems "posed a risk to competition." Rather, the cited decisions are simply routine licensing orders granting the applications as proposed.

²³ Reply at 6-10; *see also AT&T Submarine Order* ¶ 51 (declining to find that AT&T possessed market power on the route from St. Thomas to St. Croix, even though its system "would be the first fiber optic facilities to exist along this route," when another competitor was "free to build its own facility").

²⁴ Letter at 12.

²⁵ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor To SBC Communications, Inc., Transferee*, Mem. Opin. & Order, 13 FCC Rcd 21292, ¶ 26 (1998); *see also, Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control*, 14 FCC Rcd 14712, ¶ 571(1999).

this proceeding. What is more, Wavecom has not violated any law.²⁶ This claim must therefore be rejected.²⁷

As demonstrated in the Applications and the Reply, the transaction is in the public interest and does not raise any anti-competitive concerns. The FCC should promptly grant the Applications without conditions.

Sincerely,

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²⁶ See Reply at 15.

²⁷ Echostar's conduct in the sole case cited by OPT in support of its past misconduct argument was relevant only because it reflected on the acquiring entity's ability and willingness to achieve the claimed public interest benefits in the transaction. *See Application of EchoStar Communications Corp., (a Nevada Corporation), General Motors Corp, and Hughes Electronics Corp. (Delaware Corporations) (Transferors) and EchoStar Commc'ns Corp. (a Delaware Corporation) (Transferee)*, Hearing Designation Order, 17 FCC Rcd. 20559, ¶¶ 34-35 (2002). The FCC in that case reiterated its prevailing principle that adjudication of claims of misconduct are best handled in other proceedings, not in a merger context. *Id.*, ¶ 33. Other authorities cited in note 37 of OPT's Letter stand only for the proposition that the FCC seeks to promote the public interest in any acquisition, an unremarkable conclusion in the current context.